BEFORE THE APPEALS BOARD
FOR THE
KANSAS DIVISION OF WORKERS COMPENSATION

GERALD E. HICKS	)	
Claimant	)	
	)	
VS.	)	
	)	
BUTLER TRANSPORT, INC.	)	
Respondent	)	Docket No. 1,026,648
	)	
AND	)	
	)	
KANSAS TRUCKERS RISK MGMT GROUP	)	
Insurance Carrier	)	

ORDER

Respondent and its insurance carrier (respondent) requested review of the April 14, 2006 preliminary hearing Order entered by Administrative Law Judge Nelsonna Potts Barnes.

ISSUES

The sole issue to be determined in this appeal is whether certain drug testing results are admissible under K.S.A. 44-501(d)(2) thus negating respondent's liability for what is otherwise apparently considered a compensable injury.

The Administrative Law Judge (ALJ) concluded that the Federal Drug Testing Custody and Control form offered by respondent and intended to establish that claimant was impaired was not admissible as evidence because respondent did not establish chain of custody beyond a reasonable doubt as required by the statute. The ALJ also concluded that respondent had failed to meet its burden of proving that claimant was impaired, or that impairment from drugs contributed to his injury. Accordingly, the ALJ went on to find that the claimant had established that it is more probably true than not true that he suffered an accidental injury arising out of and in the course of his employment with respondent and was therefore entitled to the benefits he sought.

Respondent contends that the ALJ erred in denying the admissibility of its proffered evidence supporting its "impairment defense" pursuant to K.S.A. 2005 Supp. K.S.A. 44-501(d)(2). Respondent argues that the ALJ held the lab and Dr. Tim Ryan to a higher

standard than Federal regulations and Kansas criminal law require, and that there is no statutory requirement that the lab's tracking procedures be introduced into evidence to establish an unbroken chain of custody. Respondent therefore, requests that this case be remanded to the ALJ with directions to admit the Federal Drug Testing Custody and Control form (Respondent's Exhibit 2) and the affidavit of Dr. Tim Ryan (Respondent's Exhibit 3) for consideration as evidence.

Claimant asserts that the ALJ's Order is well reasoned and should be affirmed. Furthermore, claimant contends that there is no evidence establishing a causal connection between claimant's drug usage and the accident.

FINDINGS OF FACT AND CONCLUSIONS OF LAW

Based upon the record presented to date, the Board makes the following findings of fact and conclusions of law:

The ALJ set forth the facts and circumstances surrounding this claim as well as her analysis as to the applicability of the impairment statute, K.S.A. 2005 Supp. 44-501(d)(2). The Board adopts that statement as its own and finds that the ALJ's preliminary hearing Order should be affirmed in all respects.

As noted by the ALJ, the impairment statute, K.S.A. 2005 Supp. 44-501(d)(2) compels the respondent to provide certain evidence to the trier of fact before the respondent can offer into evidence certain drug test results in order to take advantage of the statute's exemption from liability. Part of that statute dictates the requisite elements necessary in order for a drug test to be admitted into evidence. Those requisite elements are as follows:

> (A) There was probable cause to believe that the employee used, had possession of, or was impaired by the drug or alcohol while working;
> (B) the test sample was collected at a time contemporaneous with the events establishing probable cause;
> (C) the collecting and labeling of the test sample was performed by or under the supervision of a licensed health care professional;
> (D) the test was performed by a laboratory approved by the United States department of health and human services or licensed by the department of health and environment, except that a blood sample may be tested for alcohol content by a laboratory commonly used for that purpose by state law enforcement agencies;
> (E) the test was confirmed by gas chromatography-mass spectroscopy or other comparably reliable analytical method, except that no such confirmation is required for a blood alcohol sample; and
> (F) *the foundation evidence must establish, beyond a reasonable doubt, that the test results were from the sample taken from the employee.*

At the preliminary hearing, respondent offered the affidavit of a physician who

worked at the facility where the drug test was performed, and who had reviewed the drug test results which were performed at another unrelated facility. That physician, Dr. Ryan then provided respondent with an affidavit intended to satisfy each of the criteria set forth above. At the hearing, claimant's counsel objected to the admissibility of this evidence saying -

> MR. WILSON: The problem with that, Your Honor, is that Dr. Ryan [the affiant] is not an employee of MedTox [the drug testing company], and no where in his affidavit did he say he's an employee of MedTox. How does Dr. Ryan, without reviewing records, know that the chain of custody [of the sample] was appropriate. He doesn't. That requires testimony. Mr. Cowell has made certain comments that if you, if you make live witnesses or live testimony a prerequisite to these there would be five or six depositions. I submit to your Honor we have had several drug cases in our firm and we have had to have five or six depositions just to comply with the mandates under 44-501, that I am sure you will review prior to deciding the admissibility of these documents. But I submit to you that it is not, it is not unreasonable to expect that the foundation be laid properly, because if you look at the statute, and I am sure you will, they have to show beyond a reasonable doubt. And an affidavit from a doctor not associated with MedTox is certainly not beyond a reasonable doubt. . .[1]

Essentially what respondent attempted to do was to have a physician of the facility where claimant was tested authenticate and provide the foundation for the test results. The problem is, as noted by the ALJ, that the chain of custody of the sample must be established beyond a reasonable doubt.[2] Absent that element, the drug test results are, by statute, inadmissible.

The ALJ went on to explain her analysis as follows:

> 8. Respondent exhibit 2 is entitled Federal Drug Testing Custody and Control Form. This document indicates that a specimen was collected from claimant. The collector certified that the specimen was given to her by the donor and was labeled, sealed and released to Airborne Express. A courier from Airborne Express indicated that the specimen was received sealed. The next certification is from the certifying scientist who indicates that the specimen was examined, "handled using chain of custody procedures," analyzed and reported in accordance with applicable federal requirements. Respondent exhibit 2 does not contain a certification or signature from the certifying scientist that the specimen was received from Airborne Express in a sealed condition. *A mere statement that the scientist handled the specimen using "chain of custody procedures" is not sufficient given the mandate that chain of custody must be established beyond a reasonable doubt.*

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[1] P.H. Trans. at 43-44.

[2] ALJ Order (Apr. 14, 2006) at 2.

. . .

> 10. Respondent exhibit 3 is an affidavit signed by Dr. Tom Ryan. Claimant's objection to respondent exhibit 3 because it is an affidavit rather than "live testimony" is overruled. As stated previously, affidavits are admissible and can establish chain of custody. However, Dr. Ryan's affidavit does not establish chain of custody. His affidavit does not establish that the sample collected from the claimant was received by the testing laboratory in a still-sealed container and does not provide sufficient evidence about the laboratory's internal tracking procedures.[3]

Respondent's position on appeal seems to be that because Dr. Ryan attested to the criteria set forth in the statute, the drug test is therefore admissible. And that because the lab never suggested tampering occurred, that it must not have. Before the Board can consider the merits of respondent's appeal regarding the admissibility of evidence, it must first consider whether it has jurisdiction to review this preliminary hearing finding. [4]

The Board has limited authority and jurisdiction when reviewing findings from preliminary hearings. The disputed issue must be one of those specifically set forth in K.S.A. 44-534a or the ALJ must have exceeded her jurisdiction as required by K.S.A. 44-551. The jurisdictional issues listed in K.S.A. 44-534a are: (1) whether the employee suffered an accidental injury; (2) whether the injury arose out of and in the course of the employee's employment; (3) whether notice was given or claim timely made; or (4) whether certain defenses apply.

Because the issue now before the Board is not one listed in the preliminary hearing statute, the question becomes whether the ALJ exceeded her jurisdiction.[5]

As with other evidentiary questions at preliminary hearing, the ALJ is charged with the responsibility of determining whether the evidence proffered has sufficient reliability, relevance and foundation to be considered, knowing that the hearing is summary in nature. The Board finds an administrative law judge has the authority at a preliminary hearing to determine whether the respondent has met all the foundation requirements for a chemical test to be admitted into evidence.

The Board finds the ALJ did not act arbitrarily or capriciously in her exclusion of the proffered documents and, neither abused her discretion nor acted outside the scope of her jurisdiction. Therefore, the Board concludes it does not have jurisdiction to review the

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[3] *Id.*

[4] *See Anderson v. Bill Morris Construction Co., Inc.*, No. 213,350, 1999 WL 374037 (Kan. WCAB May 24, 1999).

[5] *See Garcia v. ADM Farmland*, No. 1,007,078, 2003 WL 21962903 (Kan. WCAB July 10, 2003).

ALJ's preliminary hearing finding regarding whether a party has proven the foundation requirements for the admission of a drug screen result.

WHEREFORE, it is the finding, decision and order of the Board that the respondent's appeal of the preliminary hearing Order of Administrative Law Judge Nelsonna Potts Barnes dated April 14, 2006, is dismissed.

IT IS SO ORDERED.

Dated this _____ day of July, 2006.

_____
BOARD MEMBER

c: Steven R. Wilson, Attorney for Claimant
Todd Cowell/Clinton D. Collier, Attorney for Respondent and its Insurance Carrier
Nelsonna Potts Barnes, Administrative Law Judge
Paula S. Greathouse, Workers Compensation Director